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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 661

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE, as Governor of the State of Colorado, HOMER BEDFORD, as Treasurer of the State of Colorado, BYRON ANDERSON, as Secretary of State of the State of Colorado, EDWIN C. JOHNSON, JOSEPH F. LITTLE and WILBUR M. ALTER,

Appellants,

VS.

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens of the State of Colorado, taxpayers and electors therein, for themselves and for all other persons similarly situated,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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STATEMENT OF THE CASE

Appellees have filed a Motion to Dismiss or Affirm which does not contradict any of the basic factual matters set forth in the Jurisdictional Statement and its Appendices.

Appellees do not deny the jurisdiction of this Court but, fundamentally, argue that the issues presented on this appeal, although not previously briefed, argued or

decided, are foreclosed or insubstantial. Appellees' principal argument is that the provisions of Amendment 7 requiring single member districts within counties cannot stand alone.

If Appellees' contention is correct, the express will of the people of Colorado—that there be established a system of districting based on the principle of one voter, one choice —will be frustrated. If at-large elections are established in Colorado's multi-member counties, as, appellees say, is to result from the opinion in *White v. Anderson*, ... Colo. ....., 394 P. 2d 333 (July 17, 1964), the result will be that minorities in large counties will be totally submerged. As the record presented in *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713, demonstrates, instead of unequal representation, there will be little or no representation for these groups. Appellees here have argued that underrepresentation, by means of mal-apportionment, is a matter of substantial concern to the United States Supreme Court, and this Court agreed; Appellees now argue that so long as theoretical mathematical equality is the rule of the day, practical inequality, through no representation at all, is a matter of no substance.

ARGUMENT

A. THIS COURT HAS NOT RULED THAT AMENDMENT 7 FAILS IN TOTO.

Appellees contend that the language of this Court's prior opinion forecloses the question of severability of Amendment 7, even though this issue was not presented, argued or briefed. Appellants submit that this Court is capable of determining the meaning of the words used by it in *Lucas*. Eschewing further argument of this question, we again refer to the portion of the majority opinion defining the issue in that case as "the validity . . . of the *apportionment of seats* . . . " under Amendment 7, 377 U.S. 713 at page 715, and whether the lower Court erred " . . . in

holding the legislative *apportionment* plan embodied in Amendment No. 7 to be constitutionally valid", 377 U.S. 713 at page 735 (emphasis added).

Finally, in their attempts to read into the prior opinion of this Court approval of the end result they desire, appellees state (while admitting the matter is not in issue) that this Court has approved at-large elections in multi-member counties. Note 21 at 377 U.S. 731 simply says that the Court does "not intimate" that at-large elections are invalid. This question was not before the Court and, of course, was not decided one way or the other. However, under the equal protection standard of *Reynolds v. Sims*, 377 U.S. 533, and companion cases, it is difficult to imagine a districting scheme combining at-large voting in one area and single member districts in another which would not be invidiously discriminatory. *Dorsey v. Fortson*, N.D. Ga., 228 F. Supp. 259 (March 1964); *Harris v. Shanahan*, 192 Kans. 629, 390 P. 2d 772 (March 1964). This would be true except under most unusual circumstances even though at-large elections are not deemed to be invalid, *per se*, *Butcher v. Bloom*, ... Pa. ....., 203 Atl. 2d 556 (September 1964); *Moss v. Burkhardt*, W.D. Okla., 233 F. Supp. 323 (August 1964).

At any rate, it is not argued here that the citizens of Colorado wished to eliminate at-large voting because it is or may be unconstitutional. It is argued that elimination of the evils of at-large voting was a principal, independent part of Amendment 7. As the record in *Lucas* shows, in Colorado's largest counties elections at-large had become mere lotteries, giving rise to a tendency to select candidates primarily on the basis of good old Anglo-Saxon names beginning with "A", "B", or "C". See Appendix D. Thus the fact remains without speculation that the citizens of Colorado did adopt Amendment 7, thereby establishing a valid and desirable districting system. The obverse proposition, that the invalidity of the other phases of the act

embodying the apportionment of seats should not defeat this valid portion, is evident.

B. WHETHER A LAW IS VOID FOR ALL PURPOSES UPON BEING ADJUDGED UNCONSTITUTIONAL IN PART, DEPENDS UPON ITS SEVERABILITY.

Conceding, *arguendo*, appellees' point that a law judged unconstitutional is void for all purposes (a proposition which may not survive close scrutiny in the light of *White v. Anderson*, *supra*) appellants respectfully submit that the argument begs the issue of severability presented by this appeal. Indeed, appellees have proved too much, for the very case cited by them, *Coulter v. Routt County*, 9 Colo. 258, 11 P. 199 (1886) held the act in question severable and therefore *not void* for all purposes!

C. APPELLANTS AND APPELLEES AGREE THAT THE RULES AS TO SEVERABILITY OF STATUTES AND AS TO SEVERABILITY OF CONSTITUTIONAL PROVISIONS ARE THE SAME UNDER COLORADO LAW.

While asserting this proposition appellees ignore the applicable statute, Colo. Rev. Stat. 1953, Sec. 135-1-5, set forth in full at page 11 of the Jurisdictional Statement. Perhaps this oversight arises from appellees' unwillingness to recognize the presumption favoring severability so clearly established by the statute as the policy of Colorado law.

On this subject, appellees also represent that Amendment 7 was an apportionment measure and only an apportionment measure, conveniently omitting a part of the caption of the act. Appellees quote the caption as "For the apportionment of the senate and house of representatives of the general assembly, *etc.*" (emphasis added). The "et cetera" reads "*and providing* for senatorial *districts* and representative *districts*" (emphasis added), thus clearly expressing a purpose in addition to apportionment. It should not be difficult for appellees to conceive of the

people voting for a measure establishing districting, because that is precisely what they did.

A fair reading of Amendment 7 leads to the inescapable conclusion that it contains many "principal provisions" other than apportionment which are capable of standing alone, in accordance with the intent of the people, when the apportionment features are deleted. *In re House Bill No. 165*, 15 Colo. 595, 26 P. 141 (1890) is therefore inapposite.

D. THE RULES OF SEVERABILITY AS WELL ESTABLISHED IN COLORADO ARE NOT CORRECTLY STATED BY APPELLEES.

Instead of the rule set forth in the statute, appellees would have this Court accept certain dicta taken out of context as conclusively articulating a wholly contrary view. If the rule urged by appellees is correct, to-wit, that no act will be deemed severable if the void portion was "an inducement" to the passage of the act (the word "inducement" being used in appellees' context as synonymous with "motive" or subjective intent), then it would follow that *no* legislative act could be upheld if any one of its substantive terms were stricken. As the cases cited in the Jurisdictional Statement disclose, this clearly is not the law in Colorado. On the contrary, as shown at page 12 of the Jurisdictional Statement, the rule in Colorado is that if the portion of an act remaining is capable of being executed in accordance with the legislative intent and is complete in itself, it *must* be sustained.

The word "inducement", as used in the Colorado cases appears, in proper context, to mean not merely a reason for the passage of the act but a "purpose" of the act, without which the remainder is meaningless, useless, incomplete, or reaches a result contrary to that intended. There is no reason disclosed by the record, or otherwise, to assume that the people of the state of Colorado would not have adopted a measure eliminating the state census, changing

the size of the legislature, requiring single-member districts and providing penalties for failure to redistrict, whether or not the measure also contained a plan of apportionment. In 1950 the people did adopt a measure referred by the legislature (Colo. Sess. Laws, 1951, Ch. 223, p. 553) to increase the size of the legislature. Colo. Constitution, Article V, Sec. 46; 1935 Colo. Statutes Ann. Vol. 5, 1953 Supp. It is apparent that the "motive" or "inducement" for this action was to prepare for reapportionment, which was carried out in 1953, Colo. Session Laws, 1953, Ch. 37, p. 120. This apportionment plan was held invalid in *Lisco v. McNichols*, D. Colo., 208 F. Supp. 471 (1962), but no one would argue that, because the apportionment plan of 1953 was invalid, the action of 1950 to increase the size of the legislature also would fall. It is difficult to understand why similar action combined in one bill in 1962 should be treated differently, merely because adopted on one occasion instead of two.

The cases cited by appellees, *Leddy v. People*, 59 Colo. 120, 147 P. 365 (1915); *People v. Morgan*, 79 Colo. 504, 246 P. 1024 (1926); *Denver v. Lynch*, 92 Colo. 102, 18 P. 2d 907 (1932); *American Federation of Labor, et al. v. Reilly, et al.*, 113 Colo. 90, 155 P. 2d 145 (1945), and *Four County District v. Commr.*, 149 Colo. 284, 369 P. 2d 67 (1962) are all distinguishable from the case at bar on their particular facts. In *Leddy* the invalid portion was the means of providing security for the loan authorized, thus the valid part, standing alone, accomplished a result totally different from that intended. In *Morgan*, the act was incomplete without the invalid part and could not have been rendered complete "except by inserting provisions that the act does not contain." In *Lynch*, the effect of invalidity of one part was to *add* powers not conferred by the act upon a different branch of government, again obviously a result different from that intended. In *Reilly*, the act was held severable, and certain sections were "*expressly*" dependent upon others. In *Four County District*,

after the invalid parts of the act were stricken there were no substantive provisions left.

In short, the cases cited by appellees are simply not in point.

Finally, contrary to the proposition posed by appellees is the clear rationale of the three-judge District Court for the Western District of Oklahoma. The case of *Reynolds v. State Election Board* and *Moss v. Burkhardt*, W. D. Okla., 233 F. Supp. 323 (Supplemental Order, August 19, 1964), is very nearly on all fours with the situation in Colorado. In that case the court said at 238 F. Supp., page 328:

> "We also accept the Attorney General's view that the 'Amendment was proposed by the Legislature and adopted by the people, both charged with knowledge of the supremacy of the Federal laws, and, in truth, aware that standards and guidelines were in the process of formulation in the Federal courts, and aware that the apportionment formulae in said amendment would, of course, be subordinate to the standards being so formulated.' The appropriate remedy for existing malapportionment, the people intended for it to prevail as basic law to the extent that it is in conformity with the supreme law of the land and that it would fail only insofar as it must yield to the Supremacy Clause of the Federal Constitution. To paraphrase the words of the Attorney General, we will not strike down the amendment in toto, because one Article contravenes Federal guaranties, nor an Article because a Section is void, nor a Section because a clause is bad. And see: *Guinn v. United States*, 238 U.S. 347, 366, 35 S. Ct. 926, 59 L.Ed. 1340."

The situation in Colorado is identical, in that Amendment 7, initiated concurrently with the decision in *Baker v. Carr*, 369 U.S. 186 (1962), and adopted by the people after promulgation of the opinion in *Lisco v. McNichols*, D. Colo., 208 F. Supp. 471 (1962), must be considered in light of the presumption favoring severability and the obvious fact that the people intended its provisions to take

effect, subject only to the rulings of the courts as to those portions, if any, offending the Federal Constitution.

E. THE COLORADO COURTS HAVE NOT EXPRESSED ANY OPINION ON THE SEVERABILITY OF AMENDMENT 7, NOR ISSUED ANY APPLICABLE ORDER RELATING TO THE MATTERS PRESENTED ON THIS APPEAL.

Appellees argue at some length that this Court is foreclosed from deciding an issue properly before a statutory three-judge District Court on appeal because of subsequent action by a State court. To state the proposition as a rule of appellate jurisdiction is to refute it.

When appellees state that the Colorado Supreme Court "recognized" Amendment No. 7 as void, they are once again attempting to read into judicial opinions holdings that simply are not there. What the Colorado Supreme Court recognized, albeit somewhat reluctantly, was that the District Court had acquired jurisdiction over the question of legislative apportionment, had issued an order, and stood ready to enforce that order, if necessary, under 28 U.S.C. § 2283. *White v. Anderson*, 394 P. 2d 333, and *Macdonald v. Love*, 394 P. 2d 345, are simply the interpretation of the Colorado Supreme Court of the meaning of Section 47 of Article V of the Colorado Constitution as it stood on July 17, 1964, giving effect to the decree and order of the District Court. The question of severability of Amendment No. 7 was not raised by any party before the Colorado Court in those cases, and, in view of the order of the District Court, should not have been so raised. The attempt of appellees on page 21 of their motion to fault appellants for a failure to relitigate this question hardly comports with accepted concepts of orderly relations between State and Federal courts.

The directive of the Colorado Supreme Court making absolute a rule to show cause and staying the effect of its order to a future date for further proceedings in light of

legislative action is not a final order from which an appeal can be taken, *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62. (1948). Under the Colorado Constitution providing for two legislative sessions prior to the General Election of 1966 (Colorado Constitution Article V, Section 7) no action or non-action by the legislature can be finally evaluated by the Colorado courts until the Spring of 1966. Furthermore, not all of the parties here were parties in the *White* case. Therefore the lack of an appeal in that case cannot be construed as a concession of the validity of the opinion rendered by that court.

The bootstrap attempt of appellees to treat this matter as foreclosed may prove that *appellees* have never been concerned with any part of Amendment 7 other than apportionment. It shows nothing more.

CONCLUSION

The consequences of thwarting the desires of the Colorado electorate by prohibiting subdistricting and voiding other provisions of Amendment 7 having nothing to do with apportionment, as such, are grave and substantial and have not been foreclosed by any judicial decisions or legislative action. It is essential that the United States Supreme Court re-affirm the principle that the integrity of state actions will be respected to the extent that it is possible to do so under federal constitutional limitations. Appellees have stated no grounds for rejecting this appeal.

Respectfully submitted,

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The following are the surnames of legislators from Denver for the six regular sessions preceding adoption of Amendment 7. Members are elected from the county at-large; senators for four years, representatives for two:

SENATE

1951	1953	1955	1957	1959	1961
Bennett	Bennett	Bennett	Bennett	Bennett	Allen
Bezoff	Bezoff	Bishop	Bishop	Bishop	Bennett
Bishop	Chrysler, H.	Chrysler, H.	Brown	Brown	Bishop
Chrysler	Chrysler, R.	Danks	Clarke	Clarke	Brown
Dunklee	Dunklee	Dunklee	Cleary	Cleary	Byrne
Henry	Knous	Knous	Danks	Donnelly	Chenoweth
McNichols	McNichols	Nicholson	Dunklee	Roth	Cleary
Nicholson	Nicholson	Pomponio*	Roth	Saunders	Saunders

* Appointed

HOUSE

1951	1953	1955	1957	1959	1961
Allen	Allen	Allen	Allen	Allen	Bain
Best	Best	Aspinwall	Aspgren	Byrne	Burch
Burch	Burch	Beck	Beck	Calabrese	Burk
Burk	Burk	Bell	Burch	Dines	Byrne
Butz	Burnett	Burch	Burk	Dolan	Calabrese
Caldwell	Caldwell	Burk	Byrne	Gallegos*	Dines
Carter	Carr	Calabrese	Cobb	Gilbert	Dolan
Chrysler, H.	Carter	Caldwell	Dines	Holland	Eberhardt
Crowley	Hays	Chenoweth	Gallegos*	Johnson	Gallegos*
Danks	Hodges	Clarke	Holland	Kelley	Gilbert
Gould	Holland	Cowperthwaite	Kelley	Klein	Johnson
Hart	Jackson	Hays	Klein	Moore	Kelley
Hays	Kemp	Hodges	Moore	Morrissey	Knox
Holland	Knowles	Holland	O'Donnell	O'Donnell	O'Donnell
Mann	Mann	Kelley	Slattery	Romer	Romer
		Lehman	Streltzer	Streltzer	Rubin
		Slattery	Woodhouse	Woodhouse	Streltzer

*Although persons with Spanish-American surnames constituted 6% of Denver's population in 1950 and 8.7% in 1960, Representative Gallegos is the only one of this extraction ever elected, at-large, from Denver.
Persons with Spanish-American surnames comprised 16.4% of the population of Pueblo County in 1950 and 21.4% in 1960. No person of this extraction has even been elected, at-large, from this county.
Source: U. S. Bureau of Census. Numbers and percentages of persons with Spanish-American surnames were not officially reported prior to 1950.